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In the Supreme Court of the United States

October Term, 1937

DAN B. SHIELDS, INDIVIDUALLY AND AS UNITED STATES ATTORNEY FOR THE DISTRICT OF UTAH, AND INTERSTATE COMMERCE COMMISSION, PETITIONERS

vs.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY, A CORPORATION.

BRIEF OF RESPONDENT, THE UTAH IDAHO CENTRAL RAILROAD COMPANY, IN OBJECTION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

INDEX

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In their petition for a writ of certiorari herein, the petitioners, as it seems to us, did not clearly present the questions which are involved in this case. For that reason we are making a more elaborate statement of the case than we would ordinarily consider necessary in opposing the petition.

STATEMENT OF THE CASE

Paragraph Eighth of Section 2 of the Railway Labor Act provides that: Any carrier within the provisions of the Act shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board created by the Act; that all disputes between the carrier and its employees will be handled in accordance with the Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of said section.

Said paragraph Eighth of Section 2 further provides:

> "The provisions of said paragraphs are hereby made a part of the contract of employment between

the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreement between them."

Paragraph Third of Section 2 of said Railway Labor Act is as follows:

> "*Third. Designation of representatives.*
>
> Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

Paragraph Fourth of Section 2 of said Railway Labor Act is as follows:

> "*Fourth. Organization and collective bargaining; Freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; defluction of dues from wages forbidden.*
>
> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its

employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

aragraph Fifth of Section 2 of said Railway Labor as follows:

"Fifth. Agreements to join or not to join labor organizations forbidden.

No carriers, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way."

he Mediation Board prescribed the form of notices he times and places at which the same should be l by respondent, and if the respondent is subject Railway Labor Act it then became its duty to post tices as required by said paragraph Eighth of Section

2 of the Act; however, the respondent, claiming that it is an electric interurban railroad within the exemption proviso of the Act, and, accordingly, not a carrier within the meaning of the Act, refused to post the notices.

The Tenth paragraph of Section 2 of the Act makes it a misdemeanor on the part of any carrier subject to the Act, its officers or agents, to refuse and wilfully fail to comply with the third, fourth, fifth, seventh and eighth paragraphs of said Section 2, and upon conviction, the carrier, its officers or agents, offending is subject to a fine of not less than $1,000.00 or more than $20,000.00, or imprisonment for not more than six months, or both such fine and imprisonment, and each day during which such carrier, its officers or agents shall wilfully fail or refuse to comply with the terms of such paragraphs, shall constitute a separate offense; and it is made the duty of the District Attorney of the United States to prosecute such offenses upon the application of any duly designated representative of a carrier's employees.

Such a demand was duly made upon the petitioner District Attorney, he being the District Attorney for the District of Utah, and thereupon, he threatened to prosecute the respondent for failure to post the notices as required by the said paragraph eighth of said Section 2, and thereupon, the respondent brought this suit in the District Court of the United States for the District of Utah to enjoin the said District Attorney from instituting such prosecution, and claiming in its Bill of Complaint that it is an electric interurban railroad not subject to the Railway Labor Act, and claiming further that if it should be held subject to the Act, the Act is unconstitutional as to it, and alleging that if it fails to post the notices, as required by the Act, it will subject itself to prosecution for the penalties therein fixed, notwithstanding it is not a carrier subject thereto, and notwithstanding the Act, if applicable to it, is unconstitutional; that if it did comply it would thereby admit that it is subject to the provisions of the Act, and thus voluntarily submit itself thereto, and would suffer immediate and irreparable injury and damage;

such compliance will result in demands for increase in s and demands for rules and working conditions with ct thereto, which the respondent is unable to grant use its financial condition will not permit it so to do out immediately impairing and ultimately destroying bility to operate and serve the public in the manner hich it has served it in the past; that the plaintiff never had any disputes with its employees which not been amicably adjusted, and notwithstanding it continually operated under contracts with organiza- of its employees which are independent of it and wise under its control as to pay, rules and working itions, because its employees will be influenced to don their present organization and to join those or- ations of employees of transcontinental steam roads ughout the country on the promise of such organiza- that they will receive the higher, or so-called steam- oad standard wages, and the different rules and ing conditions prevailing thereon.

The petitioner District Attorney answered the Bill omplaint by denying certain allegations thereof and ling affirmatively the determination of the Interstate merce Commission made pursuant to Section One, , of the Railway Labor Act, that the respondent was an interurban electric railroad within the meaning of exempting proviso, and which determination by the tate Commerce Commission will hereinafter be more referred to. The Interstate Commerce Commission permitted by the Court to, and did file its Petition ntervention in which it raised the same issues that raised by the Answer of the District Attorney, and h issues will likewise be hereinafter more fully referred The respondent replied to the affirmative Answer e District Attorney and the Petition in Intervention e Interstate Commerce Commission, and alleged that letermination of the Interstate Commerce Commission contrary to the uncontradicted evidence presented in hearing before it under the Section above referred hich matter will also hereinafter be more fully referred this brief.

The case went to trial upon the issues thus made, and no question was made either in the Trial Court or in the Circuit Court of Appeals, to which latter Court the case was subsequently appealed, by the petitioners herein, nor is any question made in this Court by the petitioners but that the respondent would suffer irreparable injury and damage if it complied with the Act, and no question was or has been made but that the District Attorney has threatened the prosecutions under the Act, as claimed, if respondent neglected or refused to post the notices as required by the Act.

QUESTIONS PRESENTED

The sole questions then before both lower courts were (1) whether or not the respondent is an electric interurban railroad not subject to the provisions of the Act and how that question shall be determined and (2) whether, if respondent is subject to the act, it would be unconstitutional as to it. The first question is also before this court upon the petition herein. If it be determined that the respondent is an interurban railroad and that fact was properly determined by the lower courts then there is no occasion to determine the constitutional questions, and the only other question is (2) whether there is any reason for granting the writ.

THE ARGUMENT

(1) It was the right and duty of the trial court to determine independently whether or not the respondent is an electric interurban railroad not subject to the provisions of the act.

It was and is our contention that it was the right and duty of the court independently to determine whether or not the respondent is an electric interurban railroad not subject to the act. If the criminal prosecutions which had been threatened had actually been brought, there would be two questions for the court, or the court and jury to determine. First, whether or not the respondent is a carrier subject to the act, and secondly, if it should be held that it is, then, whether or not it had posted the

notices as required by the act, both questions being essential to the determination of respondent's guilt, and there being no dispute but that the respondent had failed to post the notices, there would be only the first question to determine. Inasmuch as this suit is brought to prevent such prosecutions, there is left only the first question, and obviously that question must be determined upon the same basis as it would be determined in the criminal action. It will be observed from a reading of the provisions of the act that the authority and duty of the District Attorney to prosecute is not dependent upon any action or determination by any administrative body or tribunal; he could proceed to prosecute even if no such determination had been made; and, therefore, necessarily the determination whether or not respondent is a carrier within the act, both in the threatened criminal actions and in this suit to prevent them, must be an independent determination. Moreover, if it were held otherwise, the defendant would be deprived of its constitutional rights guaranteed under the Sixth Amendment of the Constitution of the United States, for if an administrative tribunal is empowered to determine one of the elements necessary to constitute the criminal offense in a proceeding in no way connected with the action in which the guilt of the accused is to be determined, and that determination is to be conclusive on the accused in his trial, then and by virtue of that fact his constitutional rights under the Sixth Amendment to the Constitution of the United States have been taken from him, and the same rule with respect to this matter must be followed in a suit to enjoin a criminal prosecution as in the criminal prosecution itself. Therefore it is the contention of the respondent, that as one of the elements of his guilt cannot be determined against him in a proceeding other than that in which his guilt or innocence is being determined, one of the elements necessary to prosecution under the act, to wit, respondent's status as a carrier within the act, cannot be determined against him in a proceeding other than that in which his injunctive relief is being sought.

However, the petitioners contend that no court has the right to make any such independent determination and

base their contention upon the following argument: That Section 1, First, of the Railway Labor Act provides as follows:

> "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to chapter 1 of Title 49, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier'; Provided, however, That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

That prior to bringing this suit, upon request of the Mediation Board, the Interstate Commerce Commission, after a hearing, determined that respondent is not an electric interurban railroad within the meaning of the exemption proviso, and that that determination, whether arbitrary, capricious, or not supported by substantial evidence, is nevertheless binding upon all the courts, and in any event that it is binding unless arbitrary, capricious, or not supported by substantial evidence, and that its

determination was not arbitrary, capricious, or not supported by substantial evidence.

It has been admitted by petitioners throughout this case and is now admitted, that the respondent is not operating as a part of a general steam-railroad system of transportation, and is not a part of the general railroad system of transportation operated by any other motive power. So that the issue thus raised by the claim of the petitioners is whether the determination by the Interstate Commerce Commission that respondent is not an electric interurban railroad is conclusive upon the courts, or is conclusive unless arbitrary, capricious, or not supported by substantial evidence.

For the first time in this case the contention is now made that the determination of the Interstate Commerce Commission is binding no matter how arbitrary, capricious, or without substantial evidence to support it such determination may be made. The mere statement of the claim is its own refutation, for it cannot be under our American system, that in a criminal action in which the liberty and property of the citizen is in jeopardy, the status of the citizen, which is the only issue in the case, is determined, not by evidence produced against him at the trial, but by the determination of an administrative body, which in this case is the Interstate Commerce Commission, and there is nothing left, if that determination is final, but for the court to pronounce judgment against him.

To the contention of the petitioners that the determination of the Interstate Commerce Commission is binding upon the court in a criminal action, unless it is arbitrary, capricious, or not supported by substantial evidence, we answer:

First. As stated by the majority opinions in the Circuit Court of Appeals, by virtue of the proviso of Section 1, First, of the Railway Labor Act, the authority which is vested in the Commission is to determine whether any line operated by electric power falls within the terms of the proviso. In other words, the effect of the proviso

is to except or exclude from the term "carrier" any street, interurban, or suburban electric railway, unless such railway is operated as a part of a general steam-railroad system of transportation, but not to exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. "The inclusion," said Circuit Judge Williams, "of 'any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power' and the confining of the Interstate Commerce Commission to determine 'after hearing' as to whether 'any line operated by electric power falls within the terms of this proviso,' restricts the Commission to the determination whether the Utah Idaho Central Railroad Company, a street, interurban or suburban electric railway, was operated as a part of a general steam-railroad system of transportation." It was and is conceded that it was not, and therefore the Commission had no authority to determine that it was not an interurban electric railway.

Second. The Congress has not manifested its intention that the determination of the Interstate Commerce Commission shall be binding upon the courts, even if it was not arbitrary, or capricious, or if not supported by substantial evidence. No case is cited by petitioners which holds that in a criminal case the finding of any administrative body is binding upon the court, and, as heretofore pointed out, in the very nature of things, no such holding could be made, nor any case which holds that in a suit to restrain prosecutions under a criminal statute any finding of an administrative tribunal as to the status of the plaintiff is binding in any way upon the court. In their petition, petitioners cite three cases which they claim hold that the decision of the Interstate Commerce Commission is binding if supported by substantial evidence, and is neither arbitrary nor capricious. In each of the cases cited, however, the statute expressly provided the effect of the decision of the Interstate Commerce Commission in litigation based upon such decision, and limited the right of review by the courts.

The first case cited is that of *Interstate Commerce Commission vs. Union Pacific R. R. Co.* 222 U. S. 541. In that case the suit was brought under U. S. C. A. Title 49, Section 16 (12), which reads as follows:

> "*Proceedings to enforce orders other than for payment of money.* If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission, or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

It will be observed that the statute provided that if the order was "regularly made and duly served," it should be given effect.

The next case cited is that of *Virginian Ry. Co. vs. United States*, 272 U. S. 658, which was a suit brought under the same section and in which, of course, the order of the Commission made pursuant to the same statute was given the same effect.

Judge Bratton in his dissenting opinion in this case in the Circuit Court of Appeals is mistaken when he says that there has been any change in Section 16 of the original Interstate Commerce Act with respect to the enforcement of orders of the Commission. As to reparations cases, Section 16 of the statute in subparagraph (2), originally and ever since, has made the findings prima facie evidence of the facts therein stated (U. S. C. A. Title 49, 16 (2), and the same section of the statute,

subdivision (12) thereof, as shown above, originally and now makes it the duty of the court to enforce obedience to the orders of the Commission by a writ of injunction, if the order was "regularly made and served." Moreover, the statutes relate solely to orders made by the Commission in the exercise of its powers and not to findings made merely in aid of some other administrative body, as here the Mediation Board, which is not bound to follow such findings.

The only other case cited is that of *Swayne & Hoyt, Ltd. vs. United States,* 300 U. S. 297. That case arose under the Shipping Act, and the act (U. S. C. A. Title 46, Section 828) provides that if the court determines the order of the Board to have been "regularly made and duly issued," it shall enforce obedience thereto. Indeed, all the cases which hold that the decision of an administrative body is to be given any effect in a case before a court in which that decision is involved rest upon an express provision of the statute.

At the same time the Railway Labor Act was enacted, three different statutes, to be administered by separate agencies, were enacted, the Railway Labor Act to be administered by the National Mediation Board, the Railroad Retirement Act to be administered by the Railroad Retirement Board, and the Carriers Taxing Act to be administered by the Collector of Internal Revenue. Each contained precisely the same provisos excluding interurban railroads. The obvious reason for authorizing the Interstate Commerce Commission to determine whether an interurban railroad is a part of a general steam railroad system of transportation is that in the first instance these various agencies should not make different determinations with respect to the same railroad in that regard, which might well happen if each were to make the determination under the proviso itself, but it cannot be argued therefrom that there was any intention on the part of Congress to deprive the particular railroad of having its day in court to have its status passed upon by the courts in an appropriate case, else Congress would have said so. It

is significant, indeed, that the Congress did not even specifically say that the determination by the Interstate Commerce Commission would be binding on the three agencies operating under the three acts named, as it had specifically said in the Railway Mail Pay Act, which vested authority in the Commission to determine the rates of pay to railroads for carrying mail, and also provided that the Postmaster General should pay the rates of pay so determined (U. S. C. A., Title 39, 541-566, especially 551).

As pointed out by this court in the case of *Shannahan et al, Trustees, vs. United States,* not yet officially reported, but found in 82 L. ed. at page 740, speaking through Mr. Justice Brandeis, the determination by the Commission under Section 1, First, of the Railway Labor Act is not even a decision which the Mediation Board is empowered to enforce.

> "The Act confers upon the Board no power over any carrier. It merely imposes upon the Board possible duties in respect to interstate carriers by railroad not exempted by the proviso. * * * In order not to fail in the performance of these duties the Mediation Board had to satisfy itself whether the South Shore was a railroad within the exemption proviso."

So in this case the respondent, if subject to the act, must post the notice required to be posted, irrespective of any action by the Interstate Commerce Commission or by the Mediation Board, once the form of the notice and the time and place of posting thereof is specified by the Mediation Board. Its failure so to do makes it incumbent upon the District Attorney to prosecute, and the only question in the criminal prosecution, other than the question of failure to post the notices, would be whether the defendant is a carrier within the meaning of the act, and the determination of that matter by the Interstate Commerce Commission only for the purpose of aiding the Mediation Board to perform its duties, could not be in any wise binding.

Finally, under this head, in all the cases which have come before this court involving the question whether or not particular carriers were interurban railroads, this court has not hesitated to determine the question independently of any determination by the Interstate Commerce Commission.

Piedmont & Northern Ry. Co. vs. Interstate Commerce Commission, 286 U. S. 299;

United States vs. Chicago, North Shore & Milwaukee R. Co. 288 U. S. 1.

And in the case of *United States vs. Idaho*, 298 U. S. 105, this court decided the analagous question of whether a particular line constituted a spur track, despite a prior determination thereon by the Interstate Commerce Commission.

It is claimed, however, by petitioners, that these cases are not applicable to the case at bar, for the reason that the provisions of the Interstate Commerce Act under which they arose did not specifically authorize the Commission to make the determination as to which carrier fell within their terms, and that is the only contention made as to the inapplicability of these cases to the matter in issue herein. Such contention is obviously based upon an erroneous interpretation of the provisions of the Act. The Piedmont case arose under the provisions of the Transportation Act, requiring that a certificate of convenience and necessity be obtained by a carrier subject to the provisions of the Act from the Interstate Commerce Commission, before embarking upon any extension of its lines. As heretofore pointed out, the Act specifically exempted from the provisions street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam-railroad system of transportation. The Piedmont & Northern Ry. Co. made application to the Commission for such a certificate, such application being made without prejudice to its making claim that it was exempt as an interurban. The Commission found the railway not an interurban, overruled the claim of exemption,

and denied the certificate upon the merits. Thereafter, the Piedmont commenced construction of the extensions and the Commission brought injunctive proceedings in the District Court, alleging that the construction was illegal, as no certificate had been obtained. The railway defended upon the ground that it was an interurban. The trial court overruled the defense and enjoined the construction, until a certificate had been obtained from the Commission. The railway appealed to the Circuit Court, but this court granted certiorari prior to the hearing by the Circuit Court.

The Act gave the Commission exclusive power to issue such certificates, but was silent with respect to its authority to determine what carriers were subject to the Act. It is obvious, however, that while the Act is silent as to that, it nevertheless granted such authority to the Commission as effectively as if the grant had been in express words.

The Act excluded certain types of interurbans (those operated as a part of a general steam-railroad system of transportation) from its operations. Under it, when the railway made application for a certificate, the Commission first had to determine if the railway came within the Act. Inasmuch as it was necessary to make this determination as preliminary to the determination as to whether to issue the certificate, the authority must be read into the statute as conclusively as though it was therein expressly stated.

The same is true of the case of United States vs. Idaho, supra, wherein the railroad applied for a certificate for the abandonment of a line of track. Under the Act, there could be abandonment of the line if it was a spur, so again it was necessary for the Commission to determine the preliminary question as to whether the line was a spur, before proceeding to hear the application for abandonment on the merits. As it was essential that this preliminary question be first disposed of, before the Commission could proceed to exercise the power expressly granted, the power to determine such preliminary matter must be read into the express grant to the Commission.

The case of the *United States vs. Chicago, North Shore & Milwaukee R. Co.*, 228 U. S. 1, arose under Section 20a of the Transportation Act, and required all carriers to obtain a permit from the Interstate Commerce Commission before issuing any securities, but specifically exempted interurban, street, or suburban railways, which are not operated as a part of a general steam-railroad system, from the requirement. Action was brought by the Commission to enjoin the railroad from issuing securities, without first having obtained from the Commission an order permitting it so to do. Here again, the authority of the Commission to determine whether the particular carrier was an interurban exempt from the Act was not expressly given, but again it was necessary for the Commission to pass upon that question before passing upon the application for a permit on the merits. So such authority was by the Act, by necessary implication, conferred upon the Commission, though not expressly so stated in the Act.

In each of these cases, therefore, the Commission had in fact the authority to determine whether any particular carrier was an interurban and exempt from the Act, or whether the particular line was a spur and exempt from its provisions, which authority was as effectively conferred as the authority of the Commission to make the determination as to whether a particular carrier is exempt as an interurban from the provisions of the Railway Labor Act. In each of these cases, that is, the Piedmont, the North Shore, and the Idaho, the courts, despite the fact that the Commission had the authority to find and did find with respect to whether the carrier was an interurban or whether the particular track was a spur, themselves decided and found de novo on the same questions. As the authority of the Commission to make those findings in the statutes under which those cases arose was equally as extensive as the authority of the Commission under the proviso of the Railway Labor Act, these cases must be taken as binding precedents for the proposition that the trial court in the case at bar did not err in determining de novo the respondent's status.

Third. The Interstate Commerce Commission over a long period of years has treated the respondent as an interurban railroad and recognized it as such in several different ways.

1st. Respondent was reorganized out of receivership and issued 20,000 shares of non-par common stock and two million dollars in first mortgage bonds in the year 1926, without the authority and approval of the Interstate Commerce Commission, as is required by Section 20a of the Interstate Commerce Commission Act if respondent is not an interurban electric railway. Under Section 20a such security issues are void (unless respondent is an interurban electric railway and thus exempted from the provisions of the section) and its officers and directors issuing the same are subject to penalties. Respondent believing itself to be an interurban electric railway and therefore not subject to the provisions of Section 20a, did not request approval of the Commission for the issuance of such securities.

The issue of these securities, however, was reported to the Interstate Commerce Commission on respondent's annual report form "G," and in the report, which was filed with the Commission on or about April 1, 1927, under the heading of "Explanatory Remarks," on attachment was made, explaining the set-up of the new company and its acquirement of the physical properties of the old company. Nearly a year later, the Director of Statistics asked for further information with regard to the sale of the property and the securities issued and such Director referred specifically to the pages of respondent's formal report, which is required from all common carriers generally subject to the Interstate Commerce Act.

There ensued over a period of more than two additional years correspondence between respondent's representatives and the Commission's representatives with regard to the method of accounting that respondent would be required to follow in showing on its books the reorganization of the company out of receivership and the issuance of the securities. In none of this correspondence,

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running over a period of three years or thereabouts, di
the Commission make a single objection to the fact tha
respondent did not request and receive authority for th
issuance of the securities under Section 20a.

With as much involved as there was, were respondent
not an interurban electric railway and therefore subjec
to Section 20a, it would seem almost unthinkable tha
the Commission, not having ever complained, could no
determine under another statute that respondent is no
an interurban electric railway. If such determination i
right at this time, then it would have been right at th
time this matter of security issues and reorganization ou
of receivership was before the Commission in th
correspondence mentioned.

2nd. During the entire period of its existence, re
spondent has continuously reported to the Commissio
its operations, not in the manner prescribed for railroad
of the type of ordinary steam railroads, but in the manne
prescribed for electric railways, and certainly it is anoma
ous now for the Commission to say that suddenly, witho
any change in its character, it is a railroad of the ordinar
steam type, and should have been reporting as suc
(R. 117-119).

3rd. As heretofore set out, respondent is now an
has been continuously receiving pay for the transportatio
of mail as an interurban railroad under the decision o
the Interstate Commerce Commission.

This administrative determination as to the status o
respondent as an interurban railroad brings it squarel
within the purview of the language used by this court i
the case of *United States vs. Chicago, North Shore &
Milwaukee R. R. Co.*, 288 U. S. 1, in regard to almo
this same set of facts that were adduced in evidence i
this case. This court in that case said this:

> "The required annual reports filed by th
> appellee (the Chicago, North Shore & Milwauk
> Railroad) with the Commission have shown
> securities issued since March 1, 1920 . . .

With this knowledge of the situation, the Commission never, until it requested the Attorney General to institute the present suit, by word or act, intimated that the procedure followed by the Railroad was illegal. * * * It would be difficult, indeed, to conceive a clearer case of uniform administrative construction of Section 20a as applied to this company. * * * The primary responsibility rested upon the Commission to determine whether under the circumstances the railroad was required to procure leave under Section 20a for the issuance of securities. Evidently entertaining serious doubts on this question it has, for more than a decade, resolved them in favor of the carrier, and the company and its officers have acted in reliance on the administrative tribunal's construction of the statute. At this late day the courts ought not to uphold an application of the law contradictory to this settled administrative interpretation."

The Petitioners claim that it was held by the Interstate Commerce Commission in *Rules for Testing Other Than Steam Power Locomotives,* 122 I. C. C. 414, that the respondent was not an interurban railroad, and that that hearing was a formal hearing. In the first place, the Locomotive Inspection Act, as amended, did not contain precisely the same exemption provision as in the Railway Labor Act, but omitted the word "steam." In that regard, the Commission said (122 I. C. C. at page 422):

"Under the bill first introduced, H. R. 5836, certain equipment was excepted although used on a street, suburban, or interurban railway, unless such railway was operated as a part of a 'general steam railroad' system of transportation. But the expression was changed and the word 'steam' eliminated. Evidently Congress intended to include street, suburban, and interurban electric railways if operated as a part of any general railroad system of transportation, otherwise the word 'steam' would not have been eliminated from the expression."

In other words, the Commission thus seized upon the omission of the word 'steam' to extend its jurisdiction over interurbans. And in the second place, the Locomotive Inspection Case was not a formal hearing. That case was determined on answers to questionnaires sent to the carriers, which related solely to the revenues from freight and passenger traffic.

In the third place, the Locomotive Inspection Act was a safety measure and as such to be liberally construed, and respondent had no desire to question such a safety measure being applied to it, even though not strictly within it, and has always complied with it.

Fourth. The determination by the Interstate Commerce Commission that the respondent is not an interurban railroad, even if it had the power to determine that question, is against the uncontradicted testimony introduced before the Commission, and is therefore against law. It is contended by petitioners that the District Court did not make any finding with respect to this matter, and Justice Bratton in his dissenting opinion in the Circuit Court of Appeals so states (R. 336). However, the trial court made the following findings:

> "That the only evidence introduced at said hearing (i. e. before the Interstate Commerce Commission) was the evidence introduced in behalf of The Utah Idaho Central Railroad Company, and that no evidence was introduced by any of the other parties thereto in conflict therewith. * * * That said uncontradicted evidence of the plaintiff introduced at said hearing shows and the court finds upon the said evidence, and the transcript of the record of said hearing as introduced in this cause, which is the entire record of evidence before said Commission at said hearing, that plaintiff is a railway operated by electric power and is known as, and in fact is now, and ever since its construction has been, an interurban electric railway as such term is used in and within the purview of said Railway Labor Act. * * * And that the

> determination of said Commission that the plaintiff does not constitute a street, interurban or suburban electric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1924, is against and contrary to law."

In other words, that the finding of the Commission, being against the uncontradicted evidence introduced at the hearing before it, is contrary to law.

Whether that finding is justified depends upon an analysis of the evidence introduced before the Commission. It is conceded that the evidence introduced at the hearing before the Commission and that introduced at the trial is substantially the same. That evidence is a follows:

The location of the line of the respondent is shown by the map which was introduced as Exhibit 1 (R. 157). It runs from Ogden City in Weber County through a portion of Weber, Box Elder and Cache Counties, over the state line into Preston, Franklin County, Idaho, its length being approximately 95 miles. It has two branches, one extending west and south from Lewiston, Utah, to Quinny and Thain, a distance of approximately twelve miles, and the other from Harrisville, in Weber County, Utah, to Plain City and Warren, a distance of approximately eight miles. The line extends from the middle of the block between Grant and Lincoln Avenues and Twenty-third and Twenty-fourth Streets—the block in which the Postoffice building is located in Ogden, which is the second largest city in Utah, along Lincoln Avenue, which is one of the principal streets of the city, to the next town, which is Willard, where it also occupies a public street for a distance of approximately one mile, thence to the next city, which is Brigham City, where it again runs along a public street for a distance of approximately four miles, thence to Honeyville, a small town, where it is on one of the two streets of that town. It thus serves the northern portion of the Salt Lake Valley. After leaving that town, the line extends over what is known as the Collinston divide into Cache Valley, which

the divide separates from the Salt Lake Valley, and enters Mendon, traverses there a public street throughout the city limits, thence to the next town, which is Wellsville, enters that town on a public street, makes a sharp right angle turn thereon, and then proceeds along the main street of the town for the entire length of that street. The next town is Hyrum, where the line occupies a public street for the entire length of its line therein. Thence it proceeds to Millville where it again occupies a public street between the town's limits. The same is true of the next town, Providence. Logan, the fourth largest city in Utah, is the next town reached and there the line occupies the main paved business street and its residential extension between the city limits. The same is true of the next city, Smithfield. Thence it proceeds to the next city, Richmond, where it occupies a public street for its entire length, this street being two blocks from the main street. Lewiston, the next town, is the only city or town on the line which is entered by a private right of way, although even there the track occupies a public street for a short distance. The line then enters Idaho, only because the Cache Valley extends beyond the state limits, and proceeds in Idaho a distance of about six miles to its northern terminus, the city of Preston, where it occupies the main paved street to the end of the line. (R. 79-80.)

In all of the cities, the respondent in its operation is subject to speed limit regulations of from twelve to fifteen miles per hour, in Logan along the main paved street being twelve, and it is likewise subject to the stop-and-go signals there, and in Smithfield the same as other vehicles using the streets. (R. 80-81.)

The respondent also operates a bus line from Ogden to Preston, parallelling the rail line upon which the freight and passenger trains move, except that instead of going over the Collinston divide it proceeds on the main highway eastward from Brigham City through the Sardine canyon, to the Cache Valley. (R. 81.)

The respondent also operates a local urban bus line in Logan City, which, in addition to serving the residents of the city, transports students to and from the State Agricultural College, which is located there, as well as its supplies.

Respondent's line substantially parallels the Oregon Short Line Railroad to the Collinston divide, except that the Short Line does not occupy any city or town streets, but that railroad thence proceeds northward to Cache Junction, from which a branch line parallels the respondent's line through the Cache Valley to Preston. The Oregon Short Line formerly entered Cache Valley over the Collinston divide, as does the respondent's line now, but that line was abandoned by the Short Line because it was not adaptable to steam line operation because of the heavy grades and sharp curvatures. (R. 82.)

In all the cities and towns through which the line passes, the respondent of course had to obtain franchises, as well as from the counties in which highways are occupied. All of these franchises require it to use a motive power other than steam, and some only authorize it to operate as a "street and interurban," or "interurban or street railway." (R. 158.)

18.2 per cent of respondent's line is on public highways or city or town streets, but within the limits of towns and cities, excepting Lewiston, almost one hundred per cent is on city or town streets and, with the exception noted, it is only outside these towns and cities that a private right of way is used. In other words, a private right of way is used only to reach cities and towns, so as to prevent the line being as little circuitous as practicable, but once they are reached, then the public streets are used, but, no matter how circuitous the route, the line was so constructed as to reach every city and town in the valley.

The respondent has interchanges with the Bamberger Electric line at Ogden, with the Denver and Rio Grande Western Railroad at Ogden, and with the Oregon Short

Line Railroad at several points, (R. 49), and has joint tariffs with substantially all the railroads of the country. (R. 141.)

The history of the development of respondent's line is typical of practically all interurbans, namely, the extension of street car systems and the connecting of small interurbans. The evidence discloses that history of the building of the line to be as follows. (R. 158-161):

> "The present Utah Idaho Central Railroad Company is the result of the combination and extension of several small street car and interurban properties.
>
> It had its inception in Ogden, Utah, about 1890, from a street car system, approximately three or four miles long, upon which were operated some horse drawn cars. This company eventually became insolvent and when liquidated its assets were purchased by a group of Northern Utah citizens, headed by the late David Eccles, who organized a corporation under the laws of Utah, which was known as the Ogden Rapid Transit Company. This change took place in the late nineties and thereafter marked the beginning of the rehabilitation, electrification and further expansion of the properties which are known today as the Utah Rapid Transit Company, located within the corporate limits of Ogden City, and The Utah Idaho Central Railroad Company, the interurban line in question.
>
> Sometime in the late nineties, a corporation was formed under the name of the Ogden and Northwestern Railroad Company, which built a small interurban line of railroad from the north city limits of Ogden along the country roads to Hot Springs in Box Elder County, and operated thereon for passenger and some freight business, their initial power being furnished by a small steam locomotive.

The rails of this new company connected at the north city limits of Ogden with the rails of the Ogden Rapid Transit Company on Washington Avenue, the two companies jointly handling interurban traffic.

Subsequently the same interests who owned or held control of the Ogden Rapid Transit Company acquired the ownership of the Ogden and Northwestern Railroad Company and from that time on operated common equipment over both properties.

Approximately in the year 1910, the Ogden Rapid Transit Company as a corporation acquired the property of the Ogden and Northwestern Railroad Company and equipped the latter company for an electric interurban operation and also extended the line along the public highway from Ogden Hot Springs to Brigham City, Utah, which is located twenty-one miles north of Ogden, operating electrically over the entire line for the transportation of passengers and freight.

Contemporaneously with this development between Ogden and Brigham City, practically the same people who owned the Ogden Rapid Transit Company built a line of street and interurban railway in the City of Logan, Cache County, extending same northward through Hyde Park to Smithfield, Utah, a distance of about eight miles, and south through Providence, Millville and Hyrum to Wellsville, Utah, a distance of approximately twelve miles, operating over this interurban by means of electrical power and handling passenger and freight business, the freight business being largely agricultural products produced in the vicinity of their line of railroad.

About the month of May, 1914, the Ogden Rapid Transit Company operating in Ogden City and from Ogden, Utah, to Brigham, Utah, and

the Logan Rapid Transit Company, operating in Logan City and between Wellsville, Utah, and Smithfield, Utah, were consolidated into a single corporation under the laws of the State of Utah, known as the Ogden Logan and Idaho Railway Company.

This corporation for a time thereafter operated all of the properties formerly owned and controlled by the Ogden Rapid Transit Company and the Logan Rapid Transit Company, and also commencing about the time of the consolidation rebuilt a portion of the line extending from Ogden northward through Brigham City and constructed a new line from Brigham City north over the Collinston divide into Cache Valley connecting with the southern terminus of the Logan Rapid Transit Company; also extending the northern terminus from Smithfield, Utah, to Lewiston, Utah, a distance of eleven miles, and eventually crossing the state line to Preston, Idaho, which lies approximately six miles north of the Utah state line.

The Ogden Logan and Idaho Railway Company continued thereafter to operate the street car system in the City of Ogden, the street car system in the City of Logan, and also the interurban line which had been developed out of the interurban properties of the Ogden Rapid Transit Company and the Logan Rapid Transit Company, continuing to carry on the same general character of business of transporting both passengers and freight with electric cars.

In the latter part of 1919, it seemed desirable to segregate the interurban operations of the company from the purely local street car operations in the City of Ogden and the suburban operations extending east from Ogden City into Ogden Canyon. Accordingly a new corporation was formed known as the Utah Rapid Transit Company, which took over and operated the local street car system in

Ogden, Utah, and the suburban line running east from Ogden into Ogden Canyon, the ownership and operation of the interurban railroad from Ogden, Utah, to Preston, Idaho, remaining with the Ogden Logan and Idaho Railway Company, which had changed its name to Utah Idaho Central Railroad Company.

Utah Idaho Central Railroad Company, a Utah corporation, continued to operate these interurban lines until the latter part of the year 1926, when a corporate reorganization took place and the properties were then continued under the ownership and operation of The Utah Idaho Central Railroad Company, a Delaware corporation, which is the present owner and operating company.

Throughout all of these developments of this interurban property through the various companies previously named, the personnel of its employes and owners has to a very large extent remained that of the original street car and interurban companies, namely, the Ogden Rapid Transit Company and the Logan Rapid Transit Company."

The purpose and method of operation of the line was then shown in a general way, followed by evidence in detail as to its various phases. (R. 161-164):

"As indicated in the history of the corporate development of The Utah Idaho Central Railroad Company, the property as it now exists was practically completed in the latter part of the year 1915 and represents as previously explained the joining together of individual small interurban railroads previously constructed in Cache Valley and in Weber and Box Elder Counties.

These roads were practically entirely financed by local citizens in the Northern Utah area who were collectively interested in the various agricultural and agricultural manufacturing pursuits which

are common to this section, such as dairying and milk processing; sugar beet raising and sugar manufacturing; canning; livestock; poultry; fruits; vegetables, etc.

These people were naturally also interested in the economic, cultural and educational development of the various small communities which are now contiguous to the interurban railroad. Their idea in the construction of the constituent properties and in the later joining together of these properties into one line was to furnish an easy convenient method of intercourse between those communities and also to furnish a method of transporting the raw products grown in the area to the agricultural processing and manufacturing plants which they developed within the area.

This requirement could be best and most satisfactorily served by the construction of an interurban electric line with its consequent frequent and rapid passenger service and its natural ability, by reason of its type, to provide a convenient and economical method of moving raw products at frequent intervals, and over short distances to the processing plants.

This type of service was and is distinctly within the physical scope of an interurban railroad in that, as will be later shown, its entire physical construction was designed to accommodate small trains, rapidly moving, at frequent intervals, and it is a character of service not possible of being furnished by the ordinary steam railroad, in that a major requirement of steam railroad operation is long trains and a service largely influenced as to schedule by the availibility of sufficient tonnage to approximate the rating of the power used. The continual development in steam transportation of larger power with its consequent longer trains and longer intervals between those trains creates a

physical condition which cannot be adapted to the type of service performed by an interurban railroad.

To illustrate this point, such services as the following have been performed by The Utah Idaho Central Railroad Company. The handling of raw milk from concentration points to condenseries. This service must be performed with a minimum of time enroute and a definite arriving time at the condensery to fit in with their daily evaporation program. This movement is generally accomplished with the power unit and one car and usually entails special service.

This company has also performed a service of moving shelled peas, from vineries to canning factories. In the canning of peas, it is necessary in order to preserve their natural flavor that a minimum amount of time be consumed from the field to the cannery, peas being harvested in the fields, taken to the vinery for shelling, and moving in lug boxes rapidly into the cannery before either time or temperature can start the change in flavor. This movement likewise is accomplished with one or two car trains and special service.

Another typical interurban movement is the handling of ripe tomatoes in stock cars for movement into the canning factory, usually with special service.

Large quantities of beets are handled from various loading stations in small trains to the sugar factories for processing.

These are only typical of the type of service performed and generally represent the transportation link of the industrial development contemplated as a unit by the same people who constructed the processing plants at the same time they constructed this interurban railroad.

The number of trains operated daily on this property, which will be later herein shown, in itself

presents a more concrete picture of the frequency of service actually used in the operation of the property.

Likewise, there will be shown, the large number of sidings and spurs available for the loading of raw products and also there will be shown the frequency of available passenger stops for the convenience of short distance interurban travel.

The company at the present time in addition to the operation of numerous small freight trains operates both one and two car interurban passenger trains and gasoline motor busses.

A distinctive feature in the interurban passenger operation, which tends to illustrate the type of service furnished the communities involved, is the transportation of school children. The providing of educational facilities in this section is through the location of high schools at central points rather than in each community and, in the carrying out of this policy, at public expense students are brought from their homes to these centrally located schools.

For many years pick-up and delivery service has been rendered at all available points in connection with package freight. A daily package merchandise train is operated making a round trip from Preston, Idaho, and return during the night hours.

This train is powered by an interurban electric car constructed so as to make a large portion of the car available for the handling of package freight, each car also being equipped with refrigeration facilities for the handling of perishable commodities in summer weather and with heating facilities for their handling during the winter weather. The locomotive unit on this train is likewise sufficiently powered to permit the hauling of other cars of package freight."

It is significant that there was in existence at the time of the construction of this line a steam railroad, which the respondent's line closely parallelled (R. 28). The conclusion is irresistible that the service rendered by the ordinary steam railroad served, and the reason it did not meet those needs was two-fold. It was not designed to and did not provide rapidly moving trains, stopping at frequent intervals for the transportation of the public especially the school children, as above stated, and as will later be more fully shown. It did not furnish the facilities for the gathering of the products of the soil of this purely agricultural territory and the transportation to the steam railroads of those products which could reach the outside markets without processing, and what is far more important, because it involves the greater part of the agricultural products of the territory, their gathering and transportation to the processing plants, which, as pointed out, were thereupon located on respondent's line, and after being processed are transported by respondent to steam lines to be carried to the outside markets. If the then-existing steam railroad had met these needs, then respondent's line would never have been built. It was to meet them it was built, and continuously since then has been operated to meet those needs.

Evidence was introduced to show the various phases of the physical construction of the respondent's line and to demonstrate that they are so co-ordinated one with the other as to prevent it rendering the type of transportation service which is rendered by the ordinary steam railroad, without a complete transformation and relocation of the line in all its details, but on the contrary to compel the rendering of a type of transportation service distinct and separate from any other agency of transportation, whether that of an ordinary steam railroad, a truck line, a bus line, or an airplane line, and the limitations of its physical construction impel what has been commonly understood to be the transportation service of an interurban railroad.

This evidence as to the physical characteristics of the railroad was introduced in the form of Exhibits, which are set out in full in the record, and will only briefly be referred to herein for the purpose of showing that the foregoing conclusions are completely sustained by the record.

First, the motive power. The evidence as to that shows that the electric locomotives owned by respondent have a minimum practical rating, in other words, the tonnage the locomotive will pull, of 275 tons, and a maximum of 650 tons on two small sections of the line, with an average of 550 tons, so that the number of loaded freight cars (each of which has a gross weight of 45 tons) which a locomotive will pull between Ogden and Brigham City is twelve cars, and less on other parts of the line (R. 85; Exhibit 5, R. 164).

Second, the equipment. The evidence with respect to that shows that the respondent owns 173 freight cars, 75 of which are of such construction that they cannot be interchanged with the steam railroads. The remaining 98 are dump cars, known as gondolas, which were purchased by the respondent for the transportation of sugar beets from the dumps established on respondent's line in the various localities in which they are raised to the sugar factories. They are so used during the beet season, and during the remainder of the year they are used for the hauling of coal from the mines to the industries located on respondent's lines, and are only interchanged when lime which originates on respondent's line is shipped to sugar factories off respondent's line, that being the only commodity, other than sugar beets, originating on the line for which such cars are suitable. (R. 85-86; R. 141-142. Exhibit 6, R. 165.)

Third, the substation equipment. The evidence with respect to that shows that the electric power, with which the respondent's line is operated, is purchased by respondent from the Utah Power & Light Company and delivered by that company to the substations of the company at high voltage, transformed through the company's general

ects to 1500 volts. These substations are located at
en, Hot Springs, Dewey and Smithfield and the
ipment of substations is of such a size that it will
nish sufficient power only for the locomotives owned
the company, that is, those capable of hauling twelve
s, and if heavier trains were to be hauled, then they
uld have to be rebuilt to accommodate locomotives with
eater practical rating (R. 85-86; Exhibit 7, R. 166).

Fourth, the Electrical Positive Feeder and Trolley
rcuit and Negative Rail Circuit. The evidence as to
at shows that they are limited as to the quantity they
n carry, taking into consideration line losses, so that
ey are only sufficient to operate the locomotives with
he practical rating capacity of the locomotives owned,
o that if locomotives of a greater capacity were to be
sed, the circuits, would have to be replaced (R. 86-88;
Exhibit 8, R. 166-167), else the locomotives would be stalled
for lack of power.

Fifth, character of track construction. The evidence
as to that shows that the track is constructed of light
rails, the heaviest, except for a distance of two miles in
the paved street in Smithfield, being 70 pounds, as contra-
distinguished from an average of 100 pounds on steam
lines. The ties on which the rails rest are 6-8 inches,
as contradistinguished from steam line rail construction,
in which the ties used are not less than 7 by 9 inches, and
generally 10 inches. The respondent uses a tie six feet
in length, whereas the steam roads use a seven foot length,
the different tie and rail construction being required by
the heavier loads imposed upon them. Only eleven miles
are tie plated, a tie plate being a square piece of metal
between the rail and the tie, in order to form a wider
base for the rail to rest on, and thus relieve the stress,
whereas all the main steam lines and practically all their
branches are tie plated (R. 89; Exhibit 9, R. 168).

Sixth, car capacity of spur and passing tracks. The
evidence as to them shows that the average length of the
respondent's passing tracks will accommodate 16 cars,
whereas the average length of the passing tracks on the

steam roads is from 75 to 150. It also shows that there are 34 spurs or passing tracks on respondent's main line, and eleven on the branch lines, averaging approximately three miles apart on the main line and two miles apart on branch lines. (R. 90; Exhibit 10, R. 169.)

Seventh, the curvature of the turnouts to the yard facilities and industries on the line. The evidence as to them shows that the curvatures on the turnouts are so restricted that neither ordinary steam locomotives nor steam passenger cars can be operated over them, and over some of them the larger freight cars can only be taken when they are taken one at a time. (R. 90; Exhibit 11, shows in detail the curvatures on the main line and sidings, and the turnouts, sidings and spurs. R. 171-195). Respondent's equipment is so designed that it can be operated on such a track. For instance its locomotives are only 35 feet long with a 16 foot distance from truck center to truck center (R. 90).

Eighth, the grades. The evidence as to them shows that there are on the main line of the respondent's line 75 or 80 grade breaks, that is points at which the percentage of grade, or the up hill or the down hill changes; in other words, that the line follows the contour of the country ordinarily, with no attempt to change the grades by cuts and fills, with the result that there are on the line what would be considered excessive grades for a steam line. The maximum is 4.77. It is indeed significant in this respect that as already pointed out, the line is built over the Collinston divide, formerly used by the Oregon Short Line, and which was abandoned by that railroad and its road reconstructed to avoid the grades and curvatures over that hill (R. 82).

By means of a profile map of respondent's road as it is constructed in ten mile areas, with the factory rating and practical rating of the locomotives imposed thereon, there is shown the combined effect of the road's physical construction and facilities upon the operation of its trains. As an example, the first sheet of Exhibit 14 shows the first ten miles from Ogden, with 13 grade breaks in

section. Over it the respondent can haul a train of
re loaded cars northbound and fourteen cars south-
d. The second sheet shows that over the next ten
sector only twelve loaded cars can be hauled. However,
s have to be spaced so that two trains are not pulling
he power in a particular sector at the same time.
n with the other sectors, except those shown on sheets
d 6 over the Collinston divide. Going north or south,
ain of only eight loaded cars can be operated, but the
ance for which that limitation exists is a little greater
g north, which is approximately eight miles, than south,
ch is six miles.

This situation limits the entire operation, so that if
ain leaves Ogden with twelve cars and four of them
pot out of the train when it reaches Dewey by reason
eing destined to intervening points, it is necessary to
de the train to enable it to go over the divide. The
e is true of southbound trains. (R. 93-94; Exhibit 14,
00-210).

Thus it is shown by the evidence that not many,
admitted by counsel for petitioners in their petition
page 6, but all of the physical characteristics of
ondent's railroad are those of an interurban railroad.
reover, that they are all correlated and tied together,
s to make necessary a particular type of transportation,
ch is interurban in character, that is, short, light trains
rated at high speed, at frequent intervals, and making
uent stops along the line, both in the carriage of pas-
gers and freight. In other words, that such a type of
ration is not made necessary by only one of those
sical characteristics, but by all of them operating
formly as limiting factors, so that a change in one of
n would not make possible a change in operation, but
would have to be changed, and substantially to the
e extent; that the limitations of motive power, electric
er at the substations and through the wires, the
racter of equipment, the length of sidings, the construc-
of the track as to rails, ties, etc., its grades, the curva-
es thereof and of the turnouts, and the operation upon

the public highways and city streets all impose upon the respondent the same limitation of operation as above outlined. If the respondent desired to increase its tonnage, it would have to operate additional trains, not longer trains (R. 88). On the contrary, the type of operation of the ordinary steam railroad is entirely different. Upon them the track construction is of heavy rails, of large ties, tie plated, capable of standing heavy loads, with motive power capable of hauling heavy tonnage, with grades and curvatures held to a minimum, permitting the operation of long and heavy trains moving at intervals fixed by the necessity of obtaining sufficient tonnage to warrant the use of the motive power, and making infrequent stops (R. 88).

The evidence, in a series of statistical exhibits, shows that, as compelled by its physical characteristics, the actual operation of the railroad is in fact of the interurban type.

Exhibit 15 shows from the years 1932 to 1935 inclusive, by months, the number of passenger trains, passenger busses and freight trains operated over the line and the average daily number. In brief, it shows that during the year 1932 there was an average of 9.7 passenger trains per day, 4.1 passenger busses and 6.6 freight trains. In the year 1933, the average number of passenger trains was 11, passenger busses 5.6, freight trains 7.7. In 1934, the average was 11.5 passenger trains, 4.1 busses and 7.7 freight trains. In the year 1935, the average was 9.6 passenger trains, 4.2 busses and 7.8 freight trains. (R. 96. Exhibit 15, R. 209-210.)

Passenger trains are operated on a regular daily schedule (Exhibit 42, R. 243). Freight trains are operated as special (or "extra") trains on orders as needed to accommodate the traffic (R. 96).

The respondent operates a daily merchandise train for the handling of less than carload freight, which is powered by a passenger car with the windows boarded up and the passenger carrying space used for the handling

package freight. Perishables in the summer time are handled on this train in a specially constructed refrigerator car, and in the winter the car is heated to protect shipments affected by extreme cold. A pick-up and delivery service is rendered as to all shipments in less than carload lots. The daily merchandise train is operated so that the shipper in Ogden, or in Salt Lake City, (the train being operated in connection with the Bamberger Electric Railroad, an interurban operating between Salt Lake and Ogden) can every working day in the year have the railroad's truck call at his place of business at any time before closing time for any merchandise he desires to ship on respondent's line and the same will be delivered to the consignee at any point on the line at the opening of business the following morning. A similar reverse service is given by these railroads southward. The freight that is thus moved consists of all types of merchandise shipped by wholesalers in Salt Lake and Ogden to consignees on respondent's line. Southward from the farms and processing plants, the agricultural products are shipped to the markets in Salt Lake and Ogden. (R. 96-97.)

Exhibit 16 is a list of the passenger stations on respondent's line, showing the distances between stations, whether they are agency stations or not, the populations of the cities or towns where stops are made, except that where no population is shown it is a country road stop. In brief, in the 107 miles of main line and the Plain City branch, there are 73 passenger stops, or approximately one stop every mile and a half, practically at every cross road. In every city or town there is an agency station and outside them the passenger walks down the country road to the stopping place and flags the train. In many of them the respondent has built a shelter as a protection against wind and rain. In the cities and towns (other than the station at Ogden), the train stops in the middle of the street, and the passenger walks out and boards the train as he would a street car. In fact, the passenger service rendered by the respondent, as is the case generally with interurbans, is but an extension of a street car system to the country. The stops are somewhat wider

spaced, because there is not the density of population there is in cities. The stops are made at the cross roads, because they are the concentration points of the areas of population. (R. 97-99. Exhibit 16, R. 211-213.)

Exhibit 17 shows for the five year period 1931 to 1935, inclusive, the number of passengers handled, the amount of passenger revenue, and the average fare per passenger. In the year 1931, the line handled 489,000 passengers, at an average fare of 18.3 cents. In 1932, 407,000 passengers, at an average fare of 16.5 cents. In 1933, 366,000 passengers, at an average fare of 16.8 cents; in 1934, 408,000 passengers, at an average fare of 15 cents, and in 1935, 400,000 passengers, at an average fare of 16.1 cents. This demonstrates that the service rendered is but an extended street car service; in other words, the closely spaced passenger stops are being used to travel from one community to another, or to and from the larger communities to work, which is a characteristic interurban service. (R. 99, 100; Exhibit 17, R. 213-214.)

Exhibit 18 classifies the passengers handled during the same five year period between regular passengers and school children. The school children in Cache Valley are transported at public expense to centrally located schools. For example, there are only two county high schools in the county, both of which have been located on respondent's line, and the students are picked up at the various stops on respondent's line and transported to and from these schools on special trains operated for that purpose at extremely low fares. The Exhibit shows that in 1935, out of a total of 400,000 passengers carried, 185,000, or a little less than half, were school children carried on special school trains and there was substantially the same percentage in the other years. (R. 100; Exhibit 18, R. 214.)

The foregoing exhibits prove that the actual operation of the respondent's line is, as not only would be expected, but made necessary by its physical makeup, not the operation of an ordinary steam railroad, but also prove that notwithstanding the limitations imposed by its type

construction, which would prevent it rendering the type service rendered by an ordinary steam railroad, nevertheless they suffice to permit respondent to render the public that type of interurban service which meets the needs of the public it serves.

By a comparison made with all the steam railroads operating into Utah, the evidence further emphasizes the difference between their physical construction and operation and that of the respondent. Thus Exhibit 19 shows the list of sidings for a distance of 200 miles from Ogden on the Los Angeles and Salt Lake Railroad, the Southern Pacific Railroad, the Oregon Short Line Railroad, the Union Pacific Railroad, and the Denver and Rio Grande Western Railroad. It will be recalled that an exhibit of this character introduced for the Utah Idaho Central showed the average length of sidings for the accommodation of trains to be 16 cars. Exhibit No. 19 shows for the Los Angeles Railroad that the average length of all its sidings in this 200 mile stretch is 87 cars, or between five and six times the length of respondent's. For the Southern Pacific, the average length is 114 cars, or between seven and eight times the length of respondent's. For the Oregon Short Line, the average length is 86 cars, or between five and six times the length of respondent's. For the Union Pacific, the average length is 109 cars, or about seven times the length of respondent's. For the Denver and Rio Grande, the average length is 86 cars, or between five and six times the length of respondent's.

The increased length of sidings on steam road tracks is to accommodate long steam road trains. For the same reason, the restricted length of respondent's is to accommodate short interurban trains. The number of sidings on the first two hundred miles of the Los Angeles Railroad is 35. The same is true of other steam roads. On the 95 miles of respondent's line, there are practically that number, in half the mileage.

The comparison of passenger stops would be much more out of line. Passenger stops on respondent's line average about every mile and a half; on the average steam

railroad, they will not average one in twenty miles. In this western country, there are distances as high as forty or fifty miles between steam railroad passenger stops. (R. 101; Exhibit 19, R. 215.)

Exhibit 20 makes a comparison between the operating results upon the steam lines coming into Utah and the results on respondent's line, with the consequent operating costs per mile, that is, the cost of labor for each car mile moved. It shows that in 1935 the average length of passenger trains on the Union Pacific was 10.7 cars, with an average cost for trainmen's service of 2.86 cents per car mile; on the Oregon Short Line, the average length of such trains was 8.6 cars and average cost 3.75 cents per car mile; on the Los Angeles and Salt Lake, the average length of such trains was 10.7 cars and average cost 3.22 cents per car mile; on the Southern Pacific, the average length of such trains was 10.3 cars and the average cost 3.52 cents per car mile; on the Denver & Rio Grande, the average length of such trains was 7.2 cars and the average cost 3.89 cents per car mile. On the respondent's lines, the average length of passenger trains was 1.1 cars and the average cost 4.9 cents per car mile; in other words, taking the Union Pacific as an example, the trains on respondent's line are one-tenth as long and the trainmen's cost per mile almost double. The comparison in other years shows similar results. (R. 103; Exhibit 20, R. 216-222.)

It shows that for the year 1935, the average length of a freight train on the Union Pacific was 60 cars; the average cost for trainmen's service was .65 of a cent per car mile. On the Oregon Short Line, the average length of such trains was 48 cars, its cost 1.01 cents per car mile. For the Los Angeles and Salt Lake, the average length of such trains was 48.3 cars, average cost 1.21 cents per car mile. For the Southern Pacific, the average length of such trains was 56.6 cars, average cost 1.08 cents per car mile. For the Denver & Rio Grande, the average length of such trains was 42.4 cars, average cost 1.28 cents per car mile. For the respondent, the

average freight train length was only 6.5 cars, average cost 2.5 cents per car mile. As compared with the Union Pacific, respondent's train length is approximately one-tenth, and respondent's labor cost for transporting each car one mile was about four times greater. (R. 102; Exhibit 20, R. 216-222.)

An even more pertinent comparison is made in Exhibit 21 between the operating results on respondent's line and on a steam railroad which operates a portion of its line by power other than steam. This is undoubtedly the type of railroad the Congress had in mind when in Section 1, First, of the Railway Labor Act it provided that "any part of the general steam railroad system of transportation now or hereafter operated by any other motive power," should not be excluded from the Act. Such a railroad is the Chicago, Milwaukee and St. Paul Railroad, a western railroad, a considerable portion of which has been electrified, namely, four or five hundred miles through Montana and east and west thereof. That road where electrified uses very large electric locomotives, with self generating features, about ten times as large as those used on respondent's line, with very heavy transmission lines, and so in Exhibit 21 the comparison is made between respondent's line and that railroad. It shows that the average length of passenger train on that portion of the railroad operated by steam was six cars with an operating cost per car mile of 4.82 cents, whereas on the portion electrified it was 10.1 cars and the cost per car mile 3.08 cents. The average length of freight trains on the steam portion was 45.8 cars and the cost per car mile was 1.16 cents, whereas on the electrified portion the average length of trains was 72.6 cars and the cost per car mile 3.08 cents. This clearly shows that where there can be an electrical operation under the same conditions as a steam operation, the railroad is capable of hauling as heavy or heavier trains, and it is even more efficient and less costly.

The situation, however, is entirely different, where, as on respondent's line or the ordinary interurban railroad,

the size of trains is limited by its physical characteristics, with consequent greatly increased cost of operation. (R. 103-104; Exhibit 21, R. 222-223.)

The facts brought out in Exhibits 20 and 21, and the differences between the operations of freight and passenger trains on steam lines and lines in part electrified, and the operation of trains on respondent's line, are more pointedly shown by the graphs, which constitute Exhibits 22, 23, 24 and 25. (R. 224-227.)

The Exhibits and the testimony respecting them bring out forcibly the difference in labor conditions on respondent's line and on steam railroads. Because of the long trains operated on steam railroads, a larger crew is required, and a different type of ability and experience, also the dangers are greater, and because steam trains are operated long distances the crews are required to be separated from their homes for long periods. On steam railroads, the crew consists of five men on passenger trains and six on freight trains, whereas on respondent's line on passenger trains a maximum of only two is required, and on freight trains a maximum of four is required, and on trains operated by a power unit and one car only two men are required. (R. 102.) The pay by reason of the foregoing differences is less on respondent's lines than on steam lines. (R. 106.)

The difference is also illustrated by the fact that since 1909 the employes of respondent have been unionized, but they did not belong to any of the steam railroad unions, commonly called the Big Brotherhoods, but were members of the Amalgamated Association of Street and Electric Employes of America, an affiliate of the American Federation of Labor, and continuously since 1909 up to June 1, 1936, by written agreements from time to time renewed between the respondent and that union, the rates of pay and conditions of labor have been fixed. Never during that entire period has there been a strike or a threat of a strike, and the amicable relations between the respondent and its employes were not disturbed until after the passage of the Railway Labor Act, when an

mpt was made by the Brotherhood of Railway Train- (one of the Big Brotherhoods) to organize the loyes into that union, for the purpose of imposing n the respondent the rates of pay and conditions of loyment prevailing on steam railroads, and to that forcing the respondent to comply with the Railway or Act. (R. 106-109, 110; Exhibits 27, 27-1, 27-2 and , R. 230-231.)

It is shown that not only is there a difference in rates pay on respondent's line, but in method of pay. On m railroads, the employes are paid on a basis of an ht-hour day, whereas on respondent's line they are d on a hour basis. The effect of this difference is wn by an illustration (R. 132):

A train man is called in Preston, Idaho, respondent's thern terminus, to bring a passenger train to Ogden, ah. That would consume three hours' actual running e. If the steam railroad method were used respondent uld be required to pay him for an eight hour day. ter he arrives in Ogden, and it is assumed respondent ds it necessary to send him to Plain City, a point about or twelve miles above Ogden, for a car of potatoes, ich would consume 45 minutes, the respondent would required to pay him the eight-hour day minimum first the run from Preston to Ogden, and would be required pay him time and a half for not less than four hours, addition to the pay for a day for three hours' work.

It is our contention that the Congress recognized these fferences when it exempted the interurban railroads m the operation of the Railway Labor Act, to prevent e undue hardship they would suffer if the standards of y and conditions of employment applicable to steam ilroads were applied to them.

The only other evidence introduced at the trial as respondent's characteristics and its operation were atements as to its revenues. The gross revenue in 1935 as $514,000.00. The average annual gross revenue over

a period of twenty years, (*) which is the period during which it has been in actual operation, is $697,000.00 per year, so that the decrease in the year 1935 over the average was $183,000.00. The average annual operating revenue during the period from passenger operations was $217,000.00. The passenger revenue in 1935 was $64,000.00. The average annual freight revenue was $404,000.00. The 1935 freight revenue was $403,000.00, or within one thousand dollars of the average during the period of the road's existence. During that entire period, there has been no substantial change in the type of freight operation or the revenues produced by it, whereas the passenger revenue in 1935 was $153,000.00 less than the twenty years' average, that reduction accounting for practically all the reduction in the gross revenue. While there has been no change in the character of the railroad, there has been a change or loss in passenger revenue, due to the increased number of automobiles in use and the building of hard surfaced highways paralleling substantially the respondent's line of railroad. There has been no change in respondent's freight operation from the beginning; the only change has been in the number of passenger trains operated. Originally trains were operated out of Ogden every two hours. They have been reduced to eight trains and busses per day. (R. 138-139.)

An analysis of the carloads of freight business during the last six months' period, which is representative of the entire period of operations, shows that the carloads of freight received by the respondent during that period was 4673 cars, of which 3843 cars, or 82.2 per cent, originated within the State of Utah and terminated on some point along respondent's line; 2336 of this number, 49.98 per cent, or about one-half, originated upon respondent's line and the balance on the lines of various steam and electric connections. In other words, only 830 cars, or only 17.8 per cent, came from without the state. Of the total of 4673 cars received, 1476 cars were of raw materials

*Note.—In using these statistics, petitioner in their petition at p. 7 only use the last ten years.

rocessing plants on respondent's line, 1716 cars were roducts used in the processing of agricultural products lants on respondent's line, and 228 cars were of other s of agricultural supplies. The total of these, or cars out of 4673 cars, were directly tied into agricul- l production or processing purely local in character, cars were construction materials and 441 cars of eral commodities.

During this same period, 4020 cars originated upon ondent's line. Of these, 2400, or 59.7 per cent, were ined to points within the State of Utah and 1620 cars, 0.3 per cent, were destined to points without the state. of these 4020 cars, 927 cars were raw agricultural ducts going to market, 1408 cars were raw agricultural ducts going to processing plants, sugar beets to the ar factories, milk to the condensers, etc., 910 cars were cessed agricultural products going to market, sugar, k, etc., 389 cars were local products produced on pondent's line and being destined to the processing nts, such as lime quarried at points on respondent's line l going to the sugar factories for use therein, and only cars represent other types of shipment. This evidence, en into consideration with the other evidence introduced, ows that the freight service rendered the territory is marily as much of a local character as the passenger vice furnished the people of the territory served. This best be emphasized by concrete examples.

The farmer bring his perishables to the stations, ere cooling facilities are furnished, and leaves them ere and they are then loaded by respondent's employes. . 98.)

The farmers of a locality gather together their agricul- ral products which are to be shipped out and bring em to the cross roads, where cars are spotted by re- ondent for loading, the siding of the respondent being cated on the average of approximately every three miles . 98); there they are loaded into the cars and respondent once, by means of a short train and light locomotive,

delivers them to transcontinental carriers, to be by them carried to the markets (R. 88).

The farmers haul their peas to the vineries, where they are shelled. There they are picked up at frequent intervals, so as to prevent losing their flavor, by small trains of one or two cars each powered by a motored passenger car, and delivered to the canneries (R. 162).

The farmers bring their milk to the cross roads, where it is picked up by respondent in one-car trains, operated at high speed (R. 92), this type of operation being necessary because of the perishable character of the commodity. These trains haul no other commodities (R. 92).

The farmers haul their sugar beets to the beet dumps, where they are loaded into respondent's cars and carried to the sugar factories. The same is true of the lime rock quarried on respondent's line. The type of service rendered is the same whether the condenser or sugar factory is located within or without the state. When processed, these products are then delivered as ordered to the steam lines for shipment to the markets (R. 92).

So much for the freight shipped out; that received consists principally of raw materials and supplies for use by the processing plants located on respondent's line and products to be processed, and building materials for those plants. That constitutes the bulk of the shipments in, and together with the shipment of agricultural supplies constitutes all except ten per cent of the shipments moving into the territory. The net result is that of the entire carload business moving in and out during the six months' period, slightly more than 28 per cent moves outside of the State of Utah, and the greater portion of this results from the purely local service furnished by the respondent. This is shown by the fact that of the 8693 cars moved, only 867, or about ten per cent, can be said to be of shipments not tied into respondent's peculiarly local service, as above set out.

The petitioners in their petition list on page 8 some of commodities handled by the respondent as shown by hibit 26, and then draw the unwarranted conclusion t they are "not commodities ordinarily handled by interurban railroad." This conclusion is not only not rranted by the evidence, but is contrary to it. The timony shows that the handling of all these products, cept about ten per cent, is in the gathering process of al products of the soil and hauling them either direct the steam roads in their original form, or after being ocessed and that the function performed thereby is no fferent than such a gathering and hauling by trucks, other words a purely local function which results in e feeding of the steam roads such traffic as any other al means of transportation would do.

The respondent is an originating and destination rrier; it is not a bridge carrier, or link in any general eam trunk system. It does not receive freight to be livered beyond its own lines. Its sole relationship to e steam lines is as a feeder line (R. 313). It makes no scrimination as to which of the steam lines to which eight is delivered, that being determined by the shipper R. 95).

Now, that being all the evidence introduced at the ial as to the status of respondent, the trial court said could not find otherwise than that respondent is an ectric interurban railroad and did find that it is. Now, is not quite clear as to why petitioners (assuming the urt had the right to determine the question indeendently) claim the court erred, nor is it clear how ey can say there is any conflict in the evidence or why e uncontradicted evidence before the Commission would arrant the Commission in holding the respondent not be an interurban railroad, even if the Commission had e authority to make any such determination. True, they peak of interurban railways changing into railroads of he type of the ordinary steam railroad, as the Piedmont Northern which was considered by the Supreme Court f the United States in the case of *Piedmont & Northern*

Ry. Co. vs. Interstate Commerce Commission, 286 U. S. 299, and we concede that an interurban railroad might so change its characteristics as to develop into a railroad of the type of the ordinary steam railroad, but so far as respondent is concerned no such claim can be made. When it was built, it was but the extension of and the connecting of two street car systems, and as constructed had all the characteristics of an interurban railroad, rendering a service separate and distinct from the type of transportation service, both passenger and freight, furnished by the ordinary steam railroad, or by the particular steam railroad which it paralleled. The evidence as above outlined shows that it has never changed its original physical characteristics, or its type of operation or service rendered, and moreover that it could not, if it desired, transform itself into a railroad of the ordinary steam railroad type, so as to render that type of transportation service which is rendered by a steam railroad, without being rebuilt and relocated as well. In addition to being reconstructed, it would also have to be relocated in order to eliminate grades and curves and be rid of the necessity of using city and town streets as a right of way, with attendant franchise limitations appertaining thereto.

The only change in respondent's situation is the loss of passenger revenue, not because of any change in its physical characteristics, or its type of operation or service, but because of the public preferring another method of transportation, the use of the private automobile, so that the history of its building having shown that it was then an interurban, petitioners would be forced, if they claim that it is a railroad of the ordinary steam railroad type now, to contend that instead of developing into such a railroad by transforming itself into one, it has shrunk into one, which is absurd. They also speak of the preponderance of freight revenue and advert to the percentage of that traffic which is interstate, but stop short of claiming that either is a determinative factor, or that both taken together are probably because it is so obvious that they or either of them cannot be, for the reason that we would then have a railroad, which, with no change in

s physical make-up, would or would not be an interurban, ecause of the manner in which the public uses its service. f passenger traffic falls off, though it be for a reason eyond the railroad's control, as for instance, because f the increase in the use of the private automobile, it oses its interurban character, if for some reason beyond ts control it loses its freight business, as, for instance, y truck competition, then it is thereby changed back into n interurban, and no one could tell what it would be at any ime in the future.

Apparently the petitioners base their contention that the finding by the Commission that respondent is not an interurban railroad is justified solely upon the relationship of its revenues as between those derived from passenger and those derived from freight traffic, regardless of whether the revenue from freight traffic is primarily local in character, as is the case with the respondent, or not. But from the inception of the development of interurban railroads, which commenced in the last years of the preceding century, it was recognized by the public that such railroads were extensively engaged in the carriage of freight. Census Reports, 1902, United States Department of Commerce and Labor; Special Reports of the Census Office, Street Railways, 1902, (R. 261-263) and the same Reports, 1907, (R. 263-265); Report of the Bureau of Census, 1912, entitled "Central Electric Light and Power Stations and Street and Electric Railways" (R. 265-266). These reports further show that their character as interurbans is regardless determined by their physical characteristics, rather than by any relationship of freight and passenger traffic to their business. The Interstate Commerce Commission, as soon as the question came before it and continuously thereafter, except as hereinafter stated, recognized that interurban railroads were extensively engaged in the transportation of freight.

Cincinnati & Columbus Traction Company vs. Baltimore & Ohio Southwestern Railroad Company et al, 20 I. C. C. 486;

St. Louis, Springfield and Peoria Railroad et al vs. Peoria and Pekin Union Railway Company, 26 I. C. C. 226;

Louisville Board of Trade et al vs. Indianapolis Columbus and Southern Traction Company et al, 27 I. C. C. 499;

Chicago, Ottawa and Peoria Railway Company vs. Chicago and Northwestern Ry. Co. et al, 33 I. C. C. 574;

Michigan R. R. Co. vs. Pere Marquette R. R. Co. et al, 741 I. C. C. 486.

It was not until the year 1922 that the Commission, by way purely of dictum, attempted to fix as a standard of determination, as to whether a particular railroad is an interurban, the relationship of its freight traffic to its passenger traffic,—*Proposed Control of Sacramento Northern by Western Pacific Railroad*, 71 I. C. C. 656. This decision was followed by a similar dictum in the same matter reported in 79 I. C. C. 782, which was followed by the *Locomotive Inspection Decision* in 1927, 122 I. C. C. 414, which has heretofore been discussed herein. Commencing, however, in 1921, the Interstate Commerce Commission, in each and every year that it made an annual report to the Congress, and including that of December, 1935, recommended either that electric railroads whose freight revenues preponderate over their passenger revenues, or that electric railroads which interchange standard freight equipment with steam railroad lines and participate in through interstate freight rates with such lines, be declared to be not interurban railroads. Nevertheless, Congress steadfastly refused to follow such recommendations, as shown by its enactments up to the present time. Indeed, as early as 1910, Congress recognized that interurban railroads might be engaged in the general business of transporting freight, Interstate Commerce Act, Section 15 (3). In the year 1918, Congress enacted a law covering railway mail pay service on urban and interurban electric railways (40 Stat. L. 748). This Act empowered the Commission: "to fix and determine from time to time

e fair and reasonable rates and compensation for the ansportation of mail matter by urban and interurban ectric railway common carriers."

Two years prior to the passage of this Act, that is, the year 1916, Congress had passed the Railway Mail ervice Pay Act applicable to transportation of mail matter railway common carriers (39 Stat. L. 412). In a formal se, the Commission refused to classify interurban electric ilways as "railway common carriers," but instead held l of the electric railways of the country, except electrified ctions of steam railroads, subject to the provisions of e statute of July, 1918 (40 Stat. L. 748), which covered ilway mail pay service on urban and interurban electric ilways. (58 I. C. C. 455.) In the decision of that case, own as the *Electric Railway Mail Pay* case, the Commis-on, among other things, said:

> "Interurban lines, as the term implies, run between two or more cities. They are operated in some respects like the steam roads so far as mail transportation is concerned. Many of them do considerable freight and express business, in addition to their passenger business. • • • A few lines receive greater revenue from freight and express than from passenger business."

In a second *Electric Railway Mail Pay* case, (98 I. C. C. 37), decided June 2, 1925, to which respondent was a arty, the Commission used this language:

> "Mail service is now authorized on the lines of 311 urban and interurban electric railway companies."

So, we have the Commission in both of these electric ilway mail pay cases recognizing the meaning of the erm "interurban electric railway," as including electric ilways, whose revenue from freight exceeds that from assengers, including respondent, and it is in accordance ith that decision that respondent has received and still eceives its pay for carrying mail (R. 95), and these cases lustrate the fact that commencing with the year 1925

the Commission has been inconsistent in its holdings with respect to the matter, the second railway mail pay case having followed the decision in the Locomotive Boiler Inspection case, already referred to.

In three of the provisions of the Transportation Act, 1920, interurban electric railways were specifically mentioned and exempted from the act, viz. Section 1 (22), excluding interurban railways from the necessity of obtaining a certificate of convenience and necessity before constructing any new lines.

Section 20 (a), which exempted interurban electric railways from its provisions requiring the approval of security issues by the Interstate Commerce Commission.

Title III of the Transportation Act, 1920, created the original Railroad Labor Board and by Section 1 thereof excluded from its provisions interurban electric railways. Under this Title of the Act, the original United States Labor Board case arose in December, 1920, and the Labor Board determined that it did not have jurisdiction over independently operated interurban railways. (Decision No. 33—Docket 26-A.)

The various interurban exclusion sections of the Transportation Act above referred to are herein set out in haec verba. U. S. C. A., title 49, sec. 73. "When used in this section the term 'carrier' means a carrier by railroad which, during any part of the period of Federal Control, engaged as a common carrier in general transportation, and competed for traffic, or connected, with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation; but does not include any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both; and the term 'test period' means the three years ending June 30, 1917."

U. S. C. A., title 49, sec. 77. "When used in this section the term 'carrier' means (1) a carrier by railroad or partly by railroad and partly by water whose railroad or system of transportation was under Federal control on February 29, 1920, or which had prior to February 28, 1920, engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; and (2) a sleeping car company whose system of transportation was under Federal control on February 29, 1920; but does not include a street or interurban electric railway not under Federal control on February 29, 1920, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both."

U. S. C. A., title 49, sec. 1 (22). "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

U. S. C. A., title 49, sec. 15a (1). "When used in this section the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term 'carrier' means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this chapter, excluding (a) sleeping car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation, or engaged in the general transportation of freight, and (d) any belt line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term 'net railway

operating income' means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents."

U. S. C. A., title 49, sec. 20a (1). "As used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this chapter, or any corporation organized for the purpose of engaging in transportation by railroad subject to this chapter."

U. S. C. A., title 45, sec. 151. . . . . "Provided, however, That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam railroad system of transportation, but shall not exclude any part of the general steam railroad system of transportation now or hereafter operated by any other motive power."

In 1933, Congress enacted Section 77 of the Bankruptcy Act, (U. S. C. A., title 11, sec. 205 (m)), in which it specifically recognized that an interurban electric railway might derive more than 50 per cent of its operating revenue from the transportation of freight in standard steam railroad freight equipment. This is to be found in subparagraph (m) of said Section 77, which reads:

> "The term 'railroad corporation' as used in this act means any common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, a suburban, or interurban electric railway which is not operated as a part of a general railroad system of transportation, or which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard steam railroad freight equipment."

After this long history of legislative action culminating in the passage of the Bankruptcy Act in March, 1933,

can there by any question that Congress has expressly decided that an interurban electric railway may transact an unusually large freight business, even to the point of deriving more revenue from the transportation of freight than it does from any other source, and irrespective of its intra- or inter-state character? Congress specifically said so in the Federal Control Act in 1918, in Sections 204 and 209 of the Transportation Act, 1920, and in paragraph (m) of Section 77 of the Bankruptcy Act in 1933. All of these statutes specifically stating that interurban electric railways may derive a large portion of their revenues from the transportation of freight merely confirm and emphasize that the handling of freight or its character or the amount thereof is not a determining factor in determining whether a railroad is an "interurban electric railway."

It is in spite of this legislative definition of an interurban railroad that the Commission in its later decisions, cited on page 21 of petitioners' petition, has held that only electric railroads dependent upon passenger traffic for the bulk of their revenues are interurban railroads, and it is in spite of that definition that the Interstate Commerce Commission held the respondent not to be an interurban railroad, because of the relationship of its freight revenues to its passenger revenues. (R. 314-325) 214 I. C. C. 707.

Also this court has recognized that the amount of freight revenue as compared with passenger revenue is not determinative of the question as to whether an electric railroad is an interurban railroad.

Omaha & Council Bluffs Street Ry. Co. vs. Interstate Commerce Commission, 230 U. S. 324.

Spokane & Inland Empire R. R. Co. vs. Interstate Commerce Commission, 241 U. S. 344.

True, petitioners rely upon *Piedmont & Northern vs. I. C. C. supra*, which has already been referred to. That was a case arising under Section 1 of the Interstate Commerce Act, which requires a certificate of convenience

and necessity from the Interstate Commerce Commission before the construction of any new line of railroad, but excepts interurbans from its provisions. Piedmont & Northern was intending to extend its lines materially and as to this the court found that such proposed new construction without permission of the Commission would be in direct violation of the policy of the Transportation Act, 1920.

The court, speaking through Mr. Justice Roberts, said:

> "In *Texas and P. R. Co. vs. Gulf C. & S. Ry. Co.*, 270 *U. S.* 266, the court announced the guiding principles to be followed in construing the very paragraph involved in the case at bar. As there indicated, the purpose of the statute to develop and maintain an adequate railway system for the people of the United States requires a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress. Accordingly, a track seven miles in length, proposed to be constructed to reach industries in territory not theretofore served by the railroad, and which would take away from a competitor much of the traffic then enjoyed, was held not to be an 'industrial track,' as that phrase is used in paragraph (22), although by strict construction it was such."

The court further said:

> "Thus it would become a connecting link in a new through route and effective line of connecting carriers which would be strongly competitive with existing trunk lines, leading from Florida and the southeast to the northern gateways • • • • "
>
> "Petitioner's own estimate contained in its application to the Commission is that the extension would gain new business diverted from steam railroads of 82,320 cars a year. • • • "

These quotations from the court's decision are clearly the basic factors on which the decision was predicated.

It is a clear case of an interurban attempting to transform itself into a railroad of the ordinary steam railroad type. This is emphasized by the decision in the other case upon which petitioners rely—*United States vs. Chicago, North Shore & Milwaukee R. R. Co., supra.* In that case the Supreme Court referred to the former case of the Piedmont & Northern, supra, and said:

> "The facts differentiate the present case from *Piedmont & Northern Ry. Co. vs. I. C. C.*, 286 *U. S.* 299. There the railway was predominantly a carrier of interchange carload freight and the proposed extension of line which was the subject of that litigation had as its object the creation of a link in a trunk line route composed of the electric line and a number of steam railroads, which would divert from other steam railroad trunk-line routes some $4,000,000 of revenue annually."

By this reference in the North Shore case decision to the Piedmont & Northern case decision, the court itself distinctly holds that the Piedmont & Northern's position was determined solely under the exclusive language of Section 1 of the Interstate Commerce Act, and that the extensions proposed to that railroad would have been a violation of the policy and purposes of the Transportation Act with regard to the extension of lines, and therefore limited the effect of that decision to the precise question before the court.

In the North Shore case, the court makes reference to the findings made by the trial court. It does not quote them, but they are herein set out:

> "Congress * * * described these railways as street, suburban and interurban electric railways * * * and by doing so adopted a descriptive term which had the sanction of time and common usage. Among the common characteristics * * * are that they use electric power in the transportation of passengers or freight or both, in intrastate commerce, occupy city streets and highways in addition

to private rights of way, stop cars or trains at street intersections and country highways for the reception and discharge of passengers, maintain loading platforms and shelter sheds without agents for passengers, have short radius curves and operate part of their system under municipal and village franchise authority and restrictions." (Docket 10,067.)

The Supreme Court in its decision used this language with regard to the foregoing findings:

> "The District Court, after making detailed and elaborate fact findings concluded as a matter of law that the railway was an independently operated electric interurban railway expressly excepted from the requirements of the section (that is Section 20a having the same exclusive language), the question is whether the facts found warrant the decision."

Incidentally the Supreme Court held that the amount of freight handled is not a determining factor. In stating the facts with respect to the road's handling freight, the court said:

> "Appellee's tracks are of standard gauge and are physically connected with those of four steam railroads at some thirteen points, and with those of three electric lines. Eight connections are used for handling interchange carload freight. The railroad has substantial facilities for serving various industries located on its lines, such as side, industrial, team and switch tracks, and freight classification tracks. It owns seven electric locomotives which are of a small type and unable to haul freight trains of the size usually employed by steam railroads, and 114 freight cars which have no electrical equipment and are interchangeable with steam railroads. Sixteen local freight tariffs are published; in 206 tariffs the railroad participates as initial carrier, and in more than 800 as a delivering or intermediate carrier, in conjunction with steam railroads.

"The total transportation revenue in 1930 was over $6,000,000, about 76 per cent from passenger traffic and about 22 per cent from freight. This ratio has been substantially maintained for some years. In 1930, 87 per cent of carload freight traffic was interchange and 78 per cent of all freight traffic was interline, but only 42 per cent of freight revenue was derived from interline business.

"Locomotives are not employed in the passenger service, the cars having installed electrical equipment and being somewhat shorter and narrower than standard passenger railroad coaches. Freight is hauled by electric locomotives. A merchandise package delivery freight service is supplied by cars similar to baggage cars on steam railroads, having self contained electric equipment, operated from the loop in Chicago to Milwaukee in trains of from one to five cars. Ae certain points gantlet tracks are required for handling freight cars, as the clearances on the main line are insufficient to permit their passage. Grades are much heavier than those customary on steam railroads, and some of the curves are of so short a radius as not to permit the passage of a steam locomotive. The company maintains no facilities for receipt or delivery of carload freight at its terminii in Chicago and Milwaukee, and cannot accomplish interchange of such freight at either, connections for this purpose being outside those cities."

After the court stating these facts the opinion continues:

"We thus have a typical example of an interurban electric line for passenger service, which has developed, in addition, such freight traffic as could advantageously be undertaken without interfering with performance of the main purpose of the carrier."

The history of the respondent is slightly different from that of the North Shore. It was constructed, it is

true, to give a typically interurban passenger service, but at the same time a typically interurban freight service of a purely local character. Incidental to that service, it was necessary to interchange freight in carload lots, and a small percentage of that interchanged freight may not be directly connected with the local purpose, but clearly it is incidental to it, and no claim is made that hauling of freight interfered with the road's performance of its passenger function.

The only reason, however, that the history of the respondent is in any wise different from that of the North Shore is that it was constructed to serve a territory which was purely agricultural in character and more sparsely settled, and the population could only be increased by a more intensive agricultural development, so that it was necessary for the respondent from the very onset to render not only an additional service to that which had been furnished by the then existing steam transportation railroad, but a service which was as distinctly interurban in character as the passenger service furnished by the respondent.

The conclusion both by logic and authority is irresistible that the trial court was right in its refusal to consider the character of respondent's freight business as in any wise determinative of the question as to whether respondent is an interurban railroad, and the test it adopted is the only true test, namely, that if its physical characteristics are such that its function is limited to performing a type of transportation service, whether passenger or freight, which is distinct and separate from that which is performed by an ordinary steam railroad, and adheres to that function, the railroad is an interurban railroad and remains such until it changes its physical characteristics.

Likewise the conclusion is irrestible that the determination of the Interstate Commerce Commission as to the respondent not being an interurban railroad is contrary to the uncontradicted evidence before it and is against law, arbitrary, and without substantial evidence to support

it; in other words the net basis of the Commission's decision is that because the passenger revenues of respondent have declined not because of any change in its characteristics or operation, but because of the use by the public of a new type of transportation, the private automobile, over which it has no control, and the consequent diminution in passenger revenue, the respondent has been transformed from an interurban railroad, as it was builded to be and has ever since operated, into a railroad that is not an interurban. This is an absurd conclusion (R. 78).

Fifth. The constitutionality of the act, as to the respondent, was by the amended bill of complaint in good faith attacked by the respondent in the suit herein. It then became necessary for the court to determine the fact as to the status of the respondent as preliminary to the determination of the constitutional question, and the trial court had the right and it was its duty to determine that status independently of any determination thereon by the Interstate Commerce Commission.

This suit is grounded upon the proposition that respondent is an interurban electric railroad exempt from the provisions of the Railway Labor Act, because it claims that it is in fact such a railroad; that notwithstanding it claims that in fact it is such a railroad the District Attorney claims that Congress has vested in the Interstate Commerce Commission authority to determine respondent's status in that regard, and pursuant to that authority the Commission has determined that respondent is not an interurban railroad, and that finding is binding upon respondent; that if such finding is construed to be binding, then it violates respondent's constitutional rights, as above stated,—this being an attack upon one particular phase of the Act applicable only to respondent and interurban railroads similarly situated, and further the Act as a whole and in certain particular sections thereof is unconstitutional, this being a general attack applicable to all railroads, whether interurban or not.

The first question that arises under such a pleading, at the trial is: "Which proposition will the court determine

first, whether respondent is exempt from the provisions of the Act, or whether it is unconstitutional under the special or general attack upon the constitutionality of the Act?" The answer to this question is not difficult, either upon principle or authority. Manifestly a court should not determine the constitutionality of a legislative act, either National or State, unless it is necessary to make the determination. If exemption from its provisions is claimed by respondent, the court will determine that question first, because if respondent is exempt, there will be no necessity for the determination of the constitutionality of the Act, either those provisions especially applicable to respondent and those similarly situated or applicable to all who are held to come within its purview, and it is only in the event that the claim of exemption is denied that it will become necessary to determine the constitutional question. *Lee, Comptroller vs. Bichell et al*, 292 *U. S.* 415. *Blair vs. United States*, 250 *U. S.* 273, *Siler vs. Louisville & N. R. Co.*, 213 *U. S.* 175, *Modern Woodmen of the World vs. Casados*, 15 *Fed. Supp.* 483.

Now, in taking the first step, in determining the first question, in determining the question as to whether respondent comes within the purview of the Act, there will ordinarily be no more difficulty than in determining any other question of fact or law, and it may be either. But where, as in this case, the claim is asserted that the court is not free to determine whether respondent comes within the Act, because that matter has been determined by an administrative body pursuant to legislative authority, and that determination is binding upon the court, a preliminary question arises, namely: Can the finding bind the court when it is engaged in determining a preliminary question necessary to be determined in the exercise of its jurisdiction, to determine whether it will pass on constitutional questions, though it may be binding in other cases? We are not here dealing with the question which we have heretofore discussed, namely, whether a finding is binding, notwithstanding Congress has not made it binding. We are assuming that it is ordinarily binding either because Congress has specifically or by necessary

implication said it is binding, or else that it is held that such manifestation of intention is unnecessary. Nor are we dealing with the question, heretofore considered, namely, as to whether such finding is arbitrary, not supported by the evidence, or contrary to and against law. We are assuming that the finding is not subject to those objections, which apply in all cases; we are assuming that it is binding ordinarily, but is it binding in this class of case, that is, in a case involving constitutional rights of liberty or property? This is the precise question which arose in the case of *St. Joseph Stockyards Co. vs. United States*, 298 *U. S.* 38. In that case, Chief Justice Hughes, speaking for the majority of the court, holds that in such a case such a finding is not binding (p. 51). Mr. Justice Brandeis, though he concurs in the result, differs with the majority on the point, although agreeing that if a constitutional question involving liberty is raised, the rule would govern. Justice Cardoza (with whom Justice Stone concurs) agrees with the majority, but only on the ground of stare decisis, so that the rule announced by the majority in that case is the law, and therefore in a case involving the rights of liberty or property, the finding of an administrative body of any fact necessary to be determined is not binding upon the court.

It is undoubtedly true that the rule is subject to certain limitations. One is that the constitutional questions are properly raised by the pleading, but no question is made by petitioners that they are not so pleaded in this case. The other is that the constitutional questions are brought into the case in good faith, and no claim has ever been asserted by petitioners that they are not in this case. Indeed an examination of the record before the Interstate Commerce Commission would disclose that that question was raised at the hearing before the Examiner at the very outset. So, under this rule, the court in this case was not bound by the finding of the Interstate Commerce Commission, even if it was not, as he found it was, contrary to and against law, and the court's finding ought not to be disturbed, even

though it be held that he was wrong in finding that the finding of the Commission was contrary to and against law, and can only be disturbed if his finding is not supported by the evidence, but we think we have shown conclusively it was.

The court having found that respondent is an interurban railroad and not within the Act, and therefore that it is unnecessary to determine the constitutional questions raised either by the special or general attack upon the Act, the next question is: "What shall the court do!" And, of course, the answer is that having properly acquired jurisdiction of the cause, the court will proceed to its final determination, and that is true even when because of the finding it develops that no Federal question is involved, which is not the case here, because here a Federal question is involved.

The cases heretofore cited under this heading sustain all of the points herein made, but the case of *Modern Woodmen of America vs. Casados, supra,* is particularly in point. In that case the plaintiff in its pleadings claimed that it was a fraternal insurance society and as such exempt from a statute of New Mexico imposing a tax upon insurance premiums, that the state tax commissioner claimed that it was not exempt and was threatening to subject it to the heavy penalties provided in the Act, and to revoke its license for failure to pay the tax, but that if it were not exempt then that the State Act violated certain provisions of the Federal Constitution. The only claim made by the defendant in the case as to the applicability of the statute on a motion to dismiss the bill was that the plaintiff was in fact an ordinary insurance company, but masquerading as a fraternal society, it being admitted that fraternal societies were exempt under the statute. The court determined from an examination of the allegations of the bill that the plainitff is a fraternal society, exempt under the statute. It declined to pass upon the constitutional questions involved and enjoined the collection of the tax. Except that the statute which was under attack in that case was a State and not a Federal

tute, which of course makes no difference, and except t in that case the finding by an administrative body was involved, which makes no difference, because that tter is governed by the rule announced by Chief Justice ghes, the case is precisely like this case.

So there can be no doubt Judge Johnson was not y justified in finding, but it was his duty to find dependently upon the question whether respondent is interurban railroad.

It may be suggested that the Supreme Court in the e of *Virginian Ry Co. vs. System Federation No.* 40, 0 *U. S.* 515, since the decision in this case by the trial irt, has decided that the Railway Labor Act here in estion is constitutional and therefore that there is now constitutional question involved in this case. Even re that the case to the fullest extent, it would make no fference, because in determining whether in a case there e constitutional questions involved, so as to enable the al court independently to determine the facts necessary decide them, does not depend upon whether they would, en reached, be determined in favor of respondent, but ether they are raised in good faith, and we have shown this case that they were. But in the Virginian Ry. se, supra, the constitutional questions herein raised were t determined, even those sections of the law subject general attack, certainly not those subject to special tack, because the Virginian Railway was not an electric e, and they are still in this case. We still insist, then, at there are certain constitutional questions as to the w which were not involved in the above case, and which spondent or any railroad may raise, but a discussion of em is not pertinent to this brief, because not going to e question whether the petition for a writ of certiorari erein should or should not be granted.

(2) There is no reason for granting the writ upon this tition.

The justification for the unusually elaborate statement, which has heretofore been made in this brief is

to show that there is no reason for granting this writ. If, as we have argued, the trial court had a right to determine independently the status of respondent, as to its being or not being an interurban railroad, then its finding that respondent is an interurban railroad will, under well established principles, be not disturbed by this court, especially when concurred in by the Circuit Court of Appeals. In the case of *Virginian Railway Company vs. System Federation No.* 40, etc., 300 U. S. 515, this court said:

> "The concurrent findings of fact of the two courts below are not shown to be plainly erroneous or unsupported by the evidence. We accordingly accept them as the conclusive basis for decision. * * * *"

If, as we contend, the trial court had the right independently to determine the status of respondent as to its being or not being an interurban railroad, and such finding of the trial court being based upon the evidence before it as to the particular facts relating to it, there necessarily will be no opportunity in this case for establishing any general principle which would be applicable to other cases, and, therefore no occasion for granting the writ applied for herein. If, on the contrary, the trial court was limited to a determination as to whether the finding of the Interstate Commerce Commission was based upon substantial evidence and not contrary to law, the fact that the trial court, upon the same evidence that was before the Commission, determined the status of respondent to be contrary to that determined by the Commission, conclusively establishes that the Commission's finding was not supported by substantial evidence and was contrary to and against law, and that finding by the trial court, concurred in by the Circuit Court of Appeals, should be held to be as conclusive upon this court as was the finding of the two lower courts in the Virginian Railway Company case, *supra*. Being based upon the particular facts before the Commission and before the trial court, relating to this respondent and not some other railroad, no principle could

be established in this case which would govern as to the status of any other railroad.

The petitioners make some point of the fact that, instead of the trial court finding that the finding of the Commission was arbitrary or not supported by the evidence, it found that it was "contrary to and against the law," because, as it said, it was against the uncontradicted evidence; but what difference does it make? If the finding of the Commission was based upon evidence which was irrelevant to the issue it was against law; likewise, if it was not supported by any substantial evidence; because to show that the evidence was substantial it must be pertinent to the issue, it cannot be irrelevant thereto. If the Commission made the finding solely upon irrelevant evidence; if it used as the determinative factor that which has no real bearing upon the issue, as it did when it found the issue solely upon the relationship of the respondent's freight revenue to its passenger revenue, then it is arbitrary, because the basis, or test used, is arbitrary.

Now, the principal reason given by the petitioners for the granting of the writ herein is that to permit each railroad claiming to be an interurban railroad and exempt from the act to have its status judicially determined will result in "paralysis of the plan established by Congress under the act." Their contention amounts to this: that Congress can enact a statute governing certain citizens and make its violation by any citizen coming within its purview a misdemeanor, and then provide that whether a citizen comes within the purview of the statute shall be determined by an administrative body, and if the citizen insists upon his right to have that question determined by a judicial tribunal, that constitutes a paralysis of the Congressional plan. The answer to this contention is two-fold: first, that Congress did not intend any such result, and, second, if it did, the plan should be paralyzed.

The only other reason given by petitioners is that to permit a judicial determination by the courts of the status of the respondent as to its being an interurban will result in delay in the administration of the statute.

To this we answer that it is far more important
question be rightly determined than that it be
determined; and that to say, that because a judi
nation takes time, a citizen charged with vi
criminal statute of the United States may be
conclusively or otherwise, by an administrative
determination of the question, either in the crimin
against him or in a suit to prevent such pro
means that government by administrative bodies
substituted in the United States for government

CONCLUSION

Wherefore, it is respectfully submitted that the
for a writ of certiorari to review the judgment
Circuit Court of Appeals for the Tenth Circuit sh
denied.

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